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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October term 1971

No. 71-7551

MARIO TARABOCCHIA,

Plaintiff,

-against-

ZIM ISRAEL NAVIGATION CO., LTD.

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD SHERWOOD
401 Broadway
New York, New York
Counsel for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

MARIO TARABOCCHIA,

Petitioner,

-against-

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner, Mario Tarabocchia, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit rendered after remand from the Supreme Court of the United States, March 31, 1971, which judgment of the United States Court of Appeals for the Second Circuit was entered as a result of its decision dated August 12, 1971, remanding this case to the United States District Court for the Southern District of New York with instructions to dismiss the complaint.

OPINIONS OF THE COURTS

The United States District Court for the Southern District of New York, 297 F. Supp. 378, entered judgment from which defendant appealed and plaintiff cross-appealed. The United States Court of Appeals, for the Second Circuit, 417 F. 2d 476, modified in part, affirmed in part and remanded for recomputation of damages. A Petition for Writ of Certiorari was filed (October Term, 1969, No. 1068) and the United States Supreme Court, 401 U.S. 930 granted the writ, vacated the judgment and remanded the case to the Court of Appeals for the Second Circuit for further consideration. The Court of Appeals directed both parties to submit additional briefs, and then in its opinion, set forth infra at page 1a* and reported at 446 F. 2d 1375, remanded the case to the District Court with instructions to dismiss the complaint.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. On remand did the Court of Appeals properly apply this Court's

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* Numerical references followed by "a" are to the appendix included herein.

decision in *Usner v. Luckenback Overseas Corp.*, 400 U.S. 494 to the Facts of this case?

2. Should the warranty of seaworthiness be extended to the loft skid or temporary landing platform on which petitioner was working?

STATEMENT OF THE CASE

Petitioner was discharging cargo from hatch No. 2 of the SS BEERSHEVA, which was moored to Pier 32, North River, New York, at the time of his injury on October 28, 1964. On that date, petitioner was working as a dockman on a skid or temporary landing platform which extended from the loft or second story of Pier 32 North River opposite hatch No. 2 of the SS BEERSHEVA, which vessel was owned and operated by Zim Israel Navigation Co., Ltd.

The skid was held in place against the pier by means of two metal cables attached to its outer edge and then secured to the face of the pier above the skid. The inner edge of the skid rested on the pier loft by means of three metal "shoes" or lips and the skid was secured on its two corners closest to the pier by manila rope. There was a space of about two to three inches between the skid and the pier loft.

Petitioner and his partner, Domenico Morin, were working on the skid helping to land drafts of plywood. The drafts

were removed from the vessel by means of the ship's booms and runners and landed on the skid. The drafts of plywood were lifted by two slings, each sling being placed under one of the ends of the draft of plywood and then the ends of the slings were attached, by means of a loop on each end, to the cargo hook on the end of the runners.

As the drafts of plywood were landed on the skid, petitioner and Morin were unhooking the drafts of plywood from the slings by following the procedure of removing the loop at one end of the sling from the cargo hook, removing the sling from under the draft and holding the end of the sling which they had removed in their hand until the winch operator commenced to take in on the cargo runners and cargo slings.

Petitioner commenced work on the skid at about 2:00 p.m. and the accident occurred between 2:00 and 2:30 p.m. on October 28, 1964.

On the particular occasion of the accident, Morin either dropped his end of the cargo sling or it was pulled from his hand by the winchman, causing the end of his cargo sling to fall into the two to three inch space between the skid and the pier loft and become caught in the space. As a result, the winches taking in on the slings dislodged the skid from the pier loft causing it to fall down, precipitating petitioner to the concrete apron or stringpiece twenty feet below.

Petitioner recovered judgment below. The District Court stated that it was unclear as to whether plaintiff's co-worker dropped his loop into the aforesaid space following the upward thrust of the winch or prior thereto and further stated that the co-worker may have negligently dropped his loop before the winchman took up the slack or the winchman may have prematurely taken up slack or both might have occurred. The District Court found that one or both were the cause of the accident.

Since both the District Court and the Court of Appeals for the Second Circuit originally approached the legal problems herein from the viewpoint that operational negligence gave rise to liability for unseaworthiness, neither was then concerned with more detailed findings and no further factual findings have been made.

The District Court also rejected petitioner's claims that the skid or temporary landing platform was an appurtenance of the vessel and thus unseaworthy for various reasons.

The Court of Appeals, with a modification not in issue, affirmed.

The shipowner petitioned for a writ of certiorari and this Court, 401 U.S. 930, granted the writ stating:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case

is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of the opinion of this Court in *Usner v. Luckenback Overseas Corp.*, 400 U.S. 494, decided January 25, 1971. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan dissent."

On remand the Court of Appeals directed the parties "to submit additional briefs in the light of *Usner v. Luckenbach Overseas Corp...*," and then rendered its decision, 446 F. 2d 1375, without apparently considering the differences between this case and *Usner, supra*, and without considering all the bases of liability for unseaworthiness set forth therein.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I

When this Honorable Court granted the petition for certiorari herein, 401 U.S. 930, vacated the judgment and remanded this case to the United States Court of Appeals for the Second Circuit for further consideration in light of *Usner, supra*, it is submitted that this Court saw that there were sufficient grounds present in the instant case to either award petitioner judgment in his favor on the basis of *Usner, supra*, or

to remand the case to the District Court for further findings. This Court could have directed the Second Circuit to dismiss the complaint on remand. It did not, for good reason, and it is urged that on remand the Second Circuit failed to consider the matters raised in *Usner, supra* and improperly remanded this case to the District Court with a direction to dismiss the complaint.

This Court should correct the situation and further direct the Court of Appeals for the Second Circuit to consider the matters raised in *Usner, supra*, and, if necessary, direct the District Court to conduct further proceedings in accordance with the guidelines established.

In further defining the elements of unseaworthiness in its decision in *Usner, supra*, this Court set forth the guidelines to be considered in deciding whether unseaworthiness exists and petitioner asks that this Court resolve the dispute herein over the interpretation of *Usner*, before that decision creates a series of conflicts of interpretation as great as the uncertainty it sought to correct.

II

Petitioner further submits that the present lack of harmony among the Circuits, on the question of how far the vessel's warranty of seaworthiness extends to shore based equipment being used as an

appurtenance of the vessel in loading or discharging, is so pronounced and so fundamental as to jeopardize the effective administration of justice. The wide difference between the positions of the Second Circuit on the one hand and the Third, Fifth and Ninth Circuits on the other beg for the intervention of this Court in effecting a resolution of the conflict of how far this Court's holding in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963) should extend.

This Court has already sought to resolve the above conflict by granting certiorari, 401 U.S. 936, of a decision of the Fifth Circuit, Court of Appeals, *Law v. Victory Carriers, Inc.*, 432 F. 2d 376 (5 Cir. 1970) and setting the case down for oral argument during the second week of October, 1971 Term of this Court. The decision is pending.

Lacking a definitive pronouncement from this Court the differences between the Circuits can only increase and the disparity of treatment accorded a longshoreman depending on where he is injured becomes more unjust each day. There is no reason why a longshoreman injured in a West Coast or Gulf Coast port or in certain East Coast ports should recover verdicts when under the same circumstances longshoremen in other ports are denied recovery.

The issue is of broad importance both in terms of the number of accidents involved and the economic impact it has on longshoremen and the shipping industry

in general, so in line with this Court's disposition of the issues in *Law v. Victory Carriers, Inc., supra,* this Court should also resolve the issues presented here.

ARGUMENT

POINT I

THE VESSEL HEREIN WAS UNSEAWORTHY AS MEASURED BY THE STANDARDS OF THIS COURT'S DECISION IN *USNER V. LUCKENBACH OVERSEAS CORP.*

a) IF NOT CLEARLY UNSEAWORTHY AS A MATTER OF LAW, THE CASE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS IN THE DISTRICT COURT TO CONSIDER VARIOUS FACTUAL BASES OF LIABILITY AS DELINEATED IN *USNER V. LUCKENBACH OVERSEAS CORP.*

It is submitted that this Court further defined the meaning of unseaworthiness in its opinion in *Usner, supra,* by emphasizing unseaworthiness as a condition. The meaning of the word "condition" in the context of the opinion appears to be equivalent to a state of being, or a state of affairs. Using *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, as an example, this Court pointed out the distinction between negligence and unseaworthiness. While treating the liability for negligence as wholly

distinct from liability for unseaworthiness, this Court recognized certain relationships between the two concepts.

For example, it clearly recognized that unseaworthiness may arise out of negligent conduct. It may likewise arise out of non-negligent conduct, but if unseaworthiness, the condition is found, it is irrelevant as to how the condition arose (whether due to negligent or non-negligent conduct). If there is unseaworthiness, the shipowner is liable for personal injuries arising therefrom.

This Court also cited *Mitchell v. Trawler Racer, Inc., supra,* in pointing out that unseaworthiness need not be a longstanding condition. If there is an unsafe condition, its age or duration appears as irrelevant as the manner of its creation.

In citing and discussing *Mascuilli v. United States,* 387 U.S. 237, it is submitted that this Court was also pointing out that the rapidity with which the condition may come into being is likewise irrelevant. *Crumady v. The J. H. Fisser,* 358 U.S. 423 is also cited as an instance of an unseaworthy condition (a transitory condition) suddenly brought into play. If unseaworthiness can be transitory, it can also be created suddenly and instantly.

We urge that every test laid down in the foregoing analysis of *Usner, supra,* is met in the instant case.

A wire loop on the end of a sling dropped into a space of approximately 2 to 3 inches between the skid and the pier loft. The trial judge so found and this finding has never been disturbed. The unseaworthy condition, the unsafe state of being that then and there existed is that the loop was in a dangerous location; once having entered the space between the skid and the dock, the loop could not be extracted without danger, and when the winches pulled on the sling, the loop end of which was caught between the skid and the pier, the skid was dislodged from the pier loft, causing petitioner's injuries. The sling with the loop at the end was of course an appurtenance of the vessel and thus no question arises as to whether or not unseaworthiness emanating therefrom is chargeable to the vessel.

In the above analysis, the "condition" was created; it was not a long standing condition; the "condition" was unsafe; the skid was suddenly dislodged from the loft; the unsafe and unseaworthy "condition" was suddenly brought into play when the winches pulled on the sling, causing the accident.

According to this analysis, petitioner is entitled to judgment in his favor having met all the requirements set down in *Usner supra*, relating to liability for unseaworthiness.

If the Second Circuit Court of Appeals on remand did any such analysis, it does not appear in its opinion which is devoid

of any mention of the above matters. Consequently, it is important that this Court grant certiorari to resolve the apparent conflict between its decision in *Usner, supra*, the decision of the Second Circuit (1a), and the decisions of the Fifth Circuit in *Aguirre v. Citizens Casualty Company*, 441 F. 2d 141 (5 Cir. 1971), decided March 26, 1971 and the Ninth Circuit in *Ryan v. Pacific Coast Shipping Co., Liberia*, 448 F. 2d 525 (9 Cir. 1971), decided September 8, 1971.

Since the District Court and the Court of Appeals in its original decision approached the case from the viewpoint that operational negligence was present and gave rise to liability for unseaworthiness they were understandably not concerned with more detailed findings. For example, the record is bare as to a number of matters referred to above. There is no proof as to the number of winchmen involved in the handling of the cargo fall*, whether one or more; no proof as to where the winch controls were located; whether if one winchman operated more than one winch, he could do so with reasonable safety; whether a signal system was in use or should have been; whether if no such system was used the winchman or winchmen could adequately see the physical objects involved in the discharge, such as the platform and the space between it and the pier; in short, whether a safe method

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* See *Aguirre, supra*.

of discharge was employed. See *Ryan, supra.*

This Court in *Usner, supra,* obviously thought some of the above factors were important when it stated:

> "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo or the manner of its stowage, might be improper. For any of these reasons or others, a vessel might not be reasonably fit for her intended service."

The record below should be developed to include these above stated factual matters, since any one of them might have been the source of a condition of unseaworthiness and they are recognized in the *Usner* case as circumstances from which a "condition" of unseaworthiness might arise independently of considerations regarding the unseaworthy condition created by the loop dropped into the space between the loft and the pier.

Accordingly, petitioner urges that further proceedings be directed toward these inquiries, in the event that this Court does not find as contended herein, that liability for unseaworthiness has already been amply demonstrated. In that event, petitioner urges that the court below be directed to enter judgment for the petitioner.

II

THE WARRANTY OF SEAWORTHINESS SHOULD BE EXTENDED TO THE LOFT SKID OR TEMPORARY LANDING PLATFORM

The District Court and the Court of Appeals for the Second Circuit below relied on the Second Circuit cases of *Fredericks v. American Export Lines*, 227 F. 2d 450 (2 Cir. 1965) cert. den. 350 U.S. 989 and *Forkin v. Furness Withy & Co.*, 323 F. 2d 638 (2 Cir. 1963) which, it is submitted, incorrectly put too much reliance on the fact that the equipment involved in the accident was owned by the stevedore and attached to the pier.

These holdings of the Second Circuit are in direct conflict with the three leading cases of *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir. 1965) cert. den. 382 U.S. 938 (1965) where a hopper located on the pier was used to temporarily hold cargo before it was dumped into a truck to be removed; in *Deffes v. Federal Barge Lines, Inc.*, 361 F. 2d 422 (5 Cir. 1962), cert. den. 385 U.S. 969 (1960) and *Huff v. Matson Navigation Co.* 338 F. 2d 205 (9 Cir. 1964) cert den. 380 U.S. 943 (1965) where a land based crane with a conveyor (marine leg) was used to take bulk cargo from the vessel and transport it to some storage area. In all three cited cases, the equipment was affixed to the pier and owned by the stevedore, but nevertheless the warranty of seaworthiness was extended to include this equipment. These holdings are in direct

conflict with the facts herein, since the skid or temporary landing platform was affixed to the pier and owned by the stevedore.

In interpreting *Gutierrez v. Waterman S.S. Corp.*, *supra*, the prevailing and it is submitted, the correct, view in the Third, Fifth and Ninth Circuits (also noted with approval in the Fourth Circuit) is that the site of the accident or where it occurred is not as important as whether the longshoreman was injured in the process of loading or discharging the vessel. The leading cases are *Thompson v. Calmar S.S. Corp.*, 331 F. 2d 657 (3 Cir. 1964), cert. den. 379 U.S. 913 (1964); *Spann v. Lauritzen*, *supra*; *Sanderlin v. Old Dominion Steve. Corp.*, 385 F 2d 79 (4 Cir. 1967) *Deffes v. Federal Barge Lines, Inc.*, *supra*; *Chagois v. Lykes Bros. Steamship Company*, 432 F. 2d 388 (5 Cir. 1970); *Huff v. Matson Navigation Co.*, *supra*; and *Gebhard v. S.S. Hawaiian Legislator*, 425 F. 2d 1303 (9 Cir. 1970). The above view also conflicts with the instant case since the Second Circuit does not seem to consider it important that the injured longshoreman was involved in loading or discharging the vessel at the time of his injury.

The instant case also meets the test of whether the appurtenance or equipment involved (here the skid or temporary landing platform) was "...an essential part of the unloading process". *Spann*, *supra* 344 F. 2d at p. 209; *Law v. Victory Carriers, Inc.*, *supra*.

The cargo or drafts of plywood being discharged herein could not be landed safely, if at all, in the pier loft without the use of the skid or platform, so it was an essential part of the unloading process and thus an appurtenance of the vessel in its discharge operation.

Further cases could be cited to show the continuing conflict between the Circuits but the above cases should be sufficient to point up the conflict and to direct this Court's attention to the restrictive interpretation of *Gutierrez, supra* by the Second Circuit which has produced the conflict.

In summary, petitioner asks that this Court resolve the conflict among the various Circuits and define the standards to be applied in extending the warranty of seaworthiness to shore based equipment being used to load or discharge a vessel.

CONCLUSION

The judgment of the Court of Appeals should be set aside and judgment should be entered in favor of petitioner or this case should be remanded to the District Court for further findings.

Respectfully submitted,

Donald Sherwood
401 Broadway
New York, New York
Counsel for Petitioner

APPENDIX 1

Decision of Court of Appeals
dated August 12, 1971

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 945 - September Term, 1970.

(On remand from the Supreme Court of the United States, March 31, 1971
Decided August 12, 1971.)

Docket No. 35391

MARIO TARABOCCHIA,

Plaintiff-Appellee-Appellant,

-against-

JOHN W. McGRATH CORP.,

Third Party Defendant.

BEFORE:

MOORE, HAYS and ANDERSON,
Circuit Judges.

Upon remand by the United States Supreme Court which vacated the judgment in favor of plaintiff and directed further consideration in the light of *Usner*

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Decision of Court of Appeals
dated August 12, 1971

v. Luckenbach Overseas Corp., 400 U.S. 494 (1971), case remanded to the United States District Court for the Southern District of New York with instructions to dismiss the complaint.

GEORGE T. DELANEY, New York, N. Y. (Kenneth Heller, New York, N. Y.), for Plaintiff-Appellee-Appellant.

MARTIN J. McHUGH, New York, N. Y. (McHugh & Leonard, New York, N. Y.), for Defendant and Third-Party Plaintiff-Appellant-Appellee.

Per Curiam:

Plaintiff, an employee of John W. McGrath Corp., stevedores, was injured while engaged in an unloading operation from the M/V Beersheva, a vessel owned by Zim Israel Navigation Co. The accident occurred when a loading platform on which plaintiff and a co-worker were standing suddenly became dislodged causing plaintiff to fall. The Trial Court found that the platform was not an appurtenance of the vessel and that the cargo sling being used in the unloading operation did not render the vessel unseaworthy. Liability was premised upon the

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Decision of Court of Appeals dated August 12, 1971

theory that an act of plaintiff's co-worker caused the accident and that "a ship is rendered unseaworthy when longshoremen make negligent use of seaworthy equipment." 297 F. Supp. 378, 382. Judgment was entered in favor of plaintiff against Zim Israel and McGrath did not dispute its indemnity obligation.

Despite the seeming incongruity of holding that a seaworthy vessel can be instantaneously transformed into an unseaworthy condition by a negligent act of a stevedore's employee, this court felt bound by previous decisions of the Supreme Court[1] and its own decisions in reliance thereon[2] to affirm the judgment. At the

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1 *Mascuilli v. United States*, 387 U.S. 207; *Waldron v. Moore-McCormack Lines*, 380 U.S. 724; *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206; *Mitchell v. Trawler Racer*, 362 U.S. 539; *Crumady v. The J. H. Fisser*, 358 U.S. 423; *Seas Shipping Co. v. Sieracki*, 328 U.S. 85; *Mahnich v. Southern S.S. Co.*, 321 U.S. 96.

2 *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961, *rehearing denied*, 386 F.2d 444, *cert. den.* 390 U.S. 1027; *Alexander v. Bethlehem Steel Corporation*, 382 F.2d 963.

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dated August 12, 1971

same time the court recognized that conflict existed between the Circuits. (the Fifth[3] and the Ninth[4]) but said that it was for the Supreme Court "to resolve the apparent conflict between the Circuits." 417 F.2d 476,478.

This resolution has now been made by the Supreme Court in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (January 25, 1971) but not without vigorous dissent by four Justices thereof. 400 U.S. at 501-504. The majority opinion reviewed the many cases which over the years have created the problem and came to the conclusion that it would be erroneous "where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence." 400 U.S. at 500.

Upon Zim Israel's petition, certiorari was granted (four Justices dissenting), the judgment vacated and

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3 *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443, *cert. den.* 389 U.S. 869; *Robichaux v. Kerr McGee Oil Industries, Inc.*, 376 F.2d 447.

4 *Tim v. American President Lines, Ltd.*, 409 F.2d 385 and cases cited therein.

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Decision of Court of Appeals
dated August 12, 1971

the case was remanded "for further consideration in the light of *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, decided January 25, 1971." 401 U.S. 930 (March 31, 1971). Such consideration has now been given in the light of that decision and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the complaint.

APPENDIX II

Judgment of Court of Appeals
dated August 12, 1971

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of August, one thousand nine hundred and seventy-one.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,

Circuit Judges

MARIO TARABOCCHIA,
Plaintiff-Appellant,

v.

MEDITERRANIAN AGENCIES INC., AMERICAN-ISRAELI SHIPPING CO. INC., and ZIM-ISRAEL NAVIGATION CO. LTD.,
Defendant and Third-Party Plaintiff

ZIM ISRAEL NAVIGATION CO. LTD.
Defendant and Third-Party Plaintiff-Appellant,

JOHN W. McGRATH CORPORATION,
Third Party Defendant.

APPENDIX II

Judgment of Court of Appeals
dated August 12, 1971

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the action be and it hereby is remanded to said District Court with instructions to dismiss the complaint in accordance with the opinion of this court, with costs to be taxed against the plaintiff-appellant Mario Tarabocchia.

s/ A. Daniel Fusaro
Clerk